HONG LEONG FINANCE BHD.

v.

DATANG-JADI INDUSTRY SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 127 OF 1985]
19 SEPTEMBER 1985

STATUTORY INTERPRETATION: *Interpretation of ss. 10, 12 of the Distress Act 1951- Whether goods should be released to the true owner - i.e. whether it falls within s. 10 or 12 - Requirements of effective withdrawal of consent to continued possession - Whether true owner has to reassert his right of ownership within a reasonable time.*

The appellant was the owner of some of the machines distrained under a Warrant of Distress obtained by the respondent (landlord of a warehouse rented to the defendant, Empat Ternama Industry Sdn. Bhd.) as the defendant was in arrears of rental. The machines belonging to the appellant were leased to the defendant. The defendant defaulted in payment of the instalments of rental and by a letter dated 8 June 1984 the appellant terminated the agreements and asked the defendant to deliver the goods. No positive step was taken by the appellant to repossess the goods until 20 December 1984.

The appellant applied for the release of the goods. The application was dismissed by a Judge in Chambers who reconfirmed her decision after hearing further arguments in open Court. The appellant appealed.

The issue here is whether the Court should order the release of the goods under s. 10 or whether no such order should be made as s. 10 is excluded by s. 12.

Held:

[1] All that was required for an effective withdrawal of consent to continued possession is for the claimant to sufficiently indicate such withdrawal by a communication from it to the defendant (*Perdana Properties' case* [1982] 1 MLJ 1 (PC)). In the instant case such communication was contained in the letter dated 8 June 1984.

[2] The question of delay is a finding of fact by the learned Judge. In this case, a period of more than six months lapsed before the appellant took any active step to assert ownership of the goods and this lapse of six months was held to be unreasonable.

[Appeal dismissed with costs.]

Cases referred to:

Times Furnishing Company Ltd. v. Hutchings & Anor. [1938] 1 KB 775
In re Fox [1948] Ch 407
Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. [1979] 1 MLJ 41
United Orient Leasing Co. Sdn. Bhd. v. Perdana Properties Bhd. [1980] 2 MLJ 130
Perdana Properties Berhad v. United Orient Leasing Company Sdn. Bhd. [1982] 1 MLJ 1

Legislation referred to:

Bankruptcy Act 1914 [UK], ss. 38(c)
Distress Ordinance 1951, ss. 10, 12, (a)
Bankruptcy Act 1967, 48, (b)(iii)

For the appellant - Jennifer Cheong; M/s. Mah-Kok & Din
For the respondent - Chong Foo Seong; M/s. Azam-Malek & Soh

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We dismissed the appeal and stated we would give our reasons later. We do so now.

The plaintiff (now respondent) is the landlord of a warehouse No. 174, Harper Street, Klang which was rented to the defendant at a monthly rental of RM8,000. On 25 October 1984, as the defendant was in arrears of rental for 7 months, the respondent obtained a Warrant of Distress distraining the defendant's good lying in the warehouse. On 20 December 1984, acting on the Warrant of Distress the bailiff seized the said goods and fixed 17 January 1985 for the auction of the same. However on the day of the auction the applicant, Hong Leong Finance Bhd. (now appellant) and other claimants managed to get the auction postponed to enable them to file the necessary applications for the release of the goods.

The appellant was the owner of some of the machines distrained which were leased to the defendant pursuant to four lease agreements. The defendant defaulted in payment of the instalments of the rental. By a letter dated 8 June 1984 the appellant terminated the agreements and asked the defendant "to deliver the goods back to us forthwith failing which we shall effect repossession." From the time of the receipt of the letter till 20 December 1984 no positive step was taken by either the defendant to deliver or the appellant to repossess the goods.

The respondent, relying on s. 12 of the Distress Act 1951 (the Act), resisted the application. The learned Judge dismissed the application in chambers. After hearing further arguments in open Court she confirmed her decision. The whole dispute seems to rest on the interpretation of ss. 10 and 12 of the Act. The material part reads:

> 12. Section 10 shall not apply-
>
> (a) ... to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof;

The material part of s. 10 provides:

> 10 (1) Where any movable property of-
>
> ...
>
> (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, has been seized under a warrant of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such ... other person aforesaid may apply to a Judge to discharge or suspend the warrant, or to release a distrained article ...

It was argued that the Court should order the release of the goods if s. 10 applies. On the other hand, it was said no such order of release should be made as s. 10 was excluded by s. 12. The contention of the appellant, both here and in the Court below, is that the landlord must show three things:

(a) that the goods were in the possession of the tenant;

(b) that the goods were there under such circumstances that the tenant was the reputed owner of the goods;

(c) that both the first and second limbs apply.

She said if any of the three limbs was not proved then the goods must be released to the true owner.

Further, the appellant says in interpreting s. 12(a) of the Act, it is necessary to look at s. 48 of the Bankruptcy Act, particularly s. 48(b)(iii) which is similar in substance to s. 12(a). For this reason the appellant cited *Times Furnishing Company Ltd., v. Hutchings & Anor.* [1938] 1 KB 775 where Humphreys J said at p. 784:

> ... For that proposition he relied on a series of cases which, I think, without exception, were bankruptcy cases. It appears to be the fact that since the reign of James I all the Bankruptcy Acts have had in them a provision which is, so far as is material, identical in language with that used in s. 4, sub-s.1, of the law of Distress Amendment Act, 1908 ...

In re Fox [1948] Ch 407 was also cited. There a builder was adjudicated bankrupt. Certain building materials were lying in the builder's yard and on the site. The trustee in bankruptcy claimed that all the materials had vested in him under s. 38(c) of the Bankruptcy Act 1914 (same as our s. 48). The Court of Appeal disagreed with the County Court Judge that there was no distinction between (a) the materials in the yard or (b) those on the site. Held that the bankrupt was in possession of the materials in the yard by permission of the first appellants in such circumstances that he was the reputed owner of them. In delivering the judgment of the Court Jenkins J, as he then was, stated at p. 413:

> ... To bring s. 38(c) into operation it must be shown not merely that the goods in question were in the bankrupt's possession, but also that they were in his possession under such circumstances that he was the reputed owner thereof, and furthermore that they were so in his possession by the consent or permission of the true owner.

In the present case, the appellant argued that since the learned Judge found that consent had been withdrawn by the true owner the question of reputed ownership could not arise. In *Perdana Properties Berhad v. United Orient Leasing Company Sdn, Bhd.* [1982] 1 MLJ 1 the Privy Council was concerned with the effect of ss. 10 and 12 of the Distress Ordinance, 1951. Held that the consent was effectively withdrawn. At p. 2 Lord Russell of Killowen, delivering the judgement of the Board, stated:

> The short point is whether in the light of the letter dated 3 September 1979 it could thereafter be said that the equipment was in the possession of the emporium by the consent and permission of the respondent. Counsel for the appellant accepted that he must surmount that hurdle at the outset (and before any discussion of reputed ownership) if he was to dispute the availability of s. 10.

At p. 94 of the Appeal Record the learned Judge, after referring to *Perdana Properties'* case (supra) observed that:

> ... the Privy Council held that all that was required for an effective withdrawal of consent to continued possession is for the claimant to sufficiently indicate such withdrawal by a communication from it to the defendant. In this case such communication was contained in the letter dated 8 June 1984, where the claimant had in no uncertain terms determined the lease agreement thereby drawing its consent to the defendant being in possession of its machinery and that such a meaning and understanding could not possibly have escaped the defendant who after all had been aware all along that it had breached a condition of the lease agreement in failing to meet payments.

Having made such a finding the appellant contended that the learned Judge should not have gone on to consider the question of reputed ownership.

On the other hand, the respondent submitted the learned Judge was right to consider the lapse of time between the sending of the letter and the date on which distress was levied. The letter was sent on 8 June 1984. The Warrant of Distress was executed on 20 December 1984 - a period of more than six months before the appellant took any active step to assert ownership of the goods.

The appellant contended that he was giving the defendant six months to deliver the goods before he considered repossession. He thought a period of six months was reasonable. But before he could do anything the goods were seized. The learned Judge had this to say at p. 95 of the Appeal Record:

> ... One would expect that when the defendant failed to deliver the machinery forthwith as directed in the claimant's letter, the claimant should have come in to reassert its ownership and since no reasons were given why it failed to do so, I consider that 6 months is too long a delay for the defendant to consider sending the machinery back especially when it had not been prompt in its payments of rentals and various reminders for payment had been given prior to the letter dated 8 June 1984. To that end, delay must work against the claimant and to that extent, the doctrine of reputed ownership applies as to prevent the claimant from its right to the ownership of the machinery distrained...

As to the three factors which the landlord had to prove in order to make s. 12(a) to apply, the respondent pointed out that s. 12 removes the right under s. 10. He submitted that there was another factor which requires the true owner to show that he has taken some positive steps to have his goods repossessed, that is, to reassert his right of ownership within a reasonable time. This factor was not discussed in *Perdana Properties'* case (supra) as Lord Russell of Killowen made clear that "... it is not proposed to discuss other questions that otherwise might have arisen."

In *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd.* [1979] 1 MLJ 41 the true owner came in only after 8 months to reassert ownership of the goods after the goods had been distrained. Syed Othman J, as he then was, made these observations at p. 42:

> ... The circumstances require that the claimants, as owners, should have taken positive steps if not at the outset, at least after the expiry of the lease, to assert that the machinery belonged to them, as they knew or should have known that the defendants were running a factory in rented premises with apparently no real assets. In the circumstances, I find that the claimants have been largely responsible for representing that the defendants' assets lay with the machinery and for painting the defendants with the colour of ownership of the machinery.

In *United Orient Leasing Co. Sdn. Bhd. v. Perdana Properties Bhd.*, [1980] 2 MLJ 130 at 133 (FC) Syed Othman FJ, in delivering the judgment of the Court stated at p. 133:

> It may be accepted that in the circumstances, the notice of assumption at the time it was given could have been for the purpose of forestalling seizure by the Court. We are also of the view that under ordinary circumstances the fact that the appellants gave notice of assumption of property without taking any positive steps to recover possession did not erase reputed ownership by the emporium at the time. The law appears to be that even if there is a termination of agreement, goods remaining in the possession of the tenant may still be within the reputed ownership of the tenant and liable to distress ...

The respondent submitted that in none of the cases cited by the appellant except in *Singma's* case (supra) was the question of delay in issue. The question of delay is a finding of fact by the learned Judge. Clearly, she considered six months too long a period to take positive steps to assert ownership. The defendant was asked on 8 June 1984 to deliver the machinery "forthwith". As the learned Judge said at p. 95 of the Appeal Record:

> ... I can understand it if the claimant did not do anything positive for a month at least to enable the defendant to deliver the machinery but to wait until the machinery were seized and then state that its right to repossess had just arisen then is stretching this right too far ...

We see no reason to interfere with the decision of the learned Judge. Accordingly, we dismissed the appeal with costs. Deposit to respondent on account of taxed costs.

Also found at [1986] 1 CLJ 297